**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**WRIT PETITION NO.115 OF 2004**
**(CIVIL APPELLATE JURISDICTION)**

Union of India
Through the Commissioner of
Customs, Pune, having his office
at ICE House,
41-A, Sassoon Road,
Opp.Wadia College, Pune- 411 001 .. Petitioners

V/s

M/s.Hoganas India Ltd.& Ors.
Ganga Commerce, 4, Koregaon Park,
North Main Road, Pune 411 001. .. Respondents.

**ALONGWITH**

**WRIT PETITION NO.1636 OF 2004**
**(CIVIL APPELLATE JURISDICTION)**

1. The Commissioner of Customs,
   Jawahar Custom House, Nhava Sheva.

2. Directorate of Revenue Intelligence,
   Mumbai. .. Petitioners

V/s

1. M/s.Sprint Services Pvt.ltd.
   Gala G, Maranbasri Industrial Estate
   Govandi Station Road,
   Deonar, Mumbai-88.

2. Sanjay Agarwal, Director of M/s.
   Sprint Services Pvt.Ltd. .. Respondents

**WITH**

**WRIT PETITION NO.9995 OF 2004**
**(CIVIL APPELLATE JURISDICTION)**

1. The Commissioner of Customs
   New Custom House,
   Central Revenue Building,
   The Mall, Amritsar - 143 001.

2. Directorate of Revenue Intelligence .. Petitioners

V/s

1. M/s.Sprint Services Pvt.Ltd.
   Gala G.Maranbasri Industrial Estate,
   Govandi Station Road, Deonar,
   Mumbai - 88.

2. Sanjay Agarwal, Director of

M/s.Sprint Services Pvt.Ltd. .. Respondents

**WITH**

**WRIT PETITION NO.4381 OF 2005**
**(CIVIL APPELLATE JURISDICTION)**

Tata Teleservices (Maharashtra) Ltd.
(formerly known as Hughes Telecom
India) Ltd., a public limited Company
having its office at Ispat House,
B.G.Kher Marg, Worli, Mumbai 400 018 .. Petitioners

V/s

1. The Union of India
   Aayakar Bhavan, M.K.Road,
   Churchgate, Mumbai 400 020.

2. The Commissioner of Customs,
   Air Cargo Complex, Sahar Airport
   Mumbai 400 099.

3. The Commissioner of Customs,
   JNPT, Nhava Sheva,
   Post Uran, Dist - Raigad,
   Maharashtra 400 707.

4. Directorate of Revenue Intelligence
   3rd/4th Floor, Hotel Wadrobe Bldg.,
   16, Arthur Bunder Road, Colaba
   Mumbai 400 005.

5. The Settlement Commission
   Customs & Central Excise, Utpad
   Shulk Bhavan, Bandra-Kurla
   Complex Bandra (East)
   Mumbai - 400 051. .. Respondents

**WITH**

**WRIT PETITION NO.671 OF 2005**
**(CRIMINAL APPELLATE JURISDICTION)**

M/s.Sun Traders
Through its proprietor
Sandeep Singhania,
19, Malad Co-op.Hsg.society,
Poddar Park, Malad (East)
Mumbai 400 097. .. Petitioner

V/s

1. Union of India
   Central Govt.Advocates
   2nd Floor, Aayakar Bhavan Annexe
   New Marine Lines, Mumbai.

2. Commissioner of Customs (I)
   ACC, Sahar Mumbai.

3. The Administrative Officer,
   Settlement Commission of
   Customs & Central Excise,
   Utpad Shulk Bhavan,
   Bandra Kurla Complex,
   Bandra (E), Mumbai 400 051. .. Respondents

**WITH**

**WRIT PETITION NO.2430 OF 2004**
**(ORDINARY ORIGINAL CIVIL JURISDICTION)**

Manish Kalvadiya
Indian Inhabitant, Resident of:
303, Prashant Complex,
Sahth Lal Society, Hira Baug,
Varachha Road, Surat -6. .. Petitioner

V/s

1. Union of India
   Through the Secretary,
   Revenue Department,
   Central Govt.Advocates,
   2nd Floor, Aaykar Bhawan,
   M.K.Road, Mumbai 400 020.

2. The Jt.Commissioner of Customs
   Air Intelligence Unit,
   C.S.Airport, Sahar, Mumbai.

3. The Settlement Commission,
   For Customs & Central Excise,
   6th/7th Floor, Utpad Shulk Bhavan,
   Bandra Kurla complex, Mumbai .. Respondents

**WITH**

**WRIT PETITION NO.1051 OF 2005**
**(ORDINARY ORIGINAL CIVIL JURISDICTION)**

Sanjay Balkrishna Chavan
of Mumbai Indian Inhabitant, residing
at Room No.1448, Building No.27,
MHB Colony, Kher Nagar, Bandra (East)
Mumbai 400 051. .. Petitioner

V/s

1. The Union of India
   (through the Joint Secretary,
   Ministry of Law & Justice, Aayakar
   Bhuvan, M.K.Road, Mumbai 400 020.

2. The Commissioner of Customs
   CIS International Airport, having
   his office at Sahar, Andheri (East),
   Mumbai 400 099.

3. The Settlement Commissioner,

Additional Bench, having his office,
at Utpad Shulk Bhuvan, Bandra
Kurla Complex, Bandra (E),
Mumbai 400 051. .. Respondents

**WITH**

**WRIT PETITION NO.2 OF 2004**
**(ORDINARY ORIGINAL CIVIL JURISDICTION)**

Bipin H.Badani
(Proprietor of M/s.Sai Impex)
26/3, 4th Cross K.V.Layout,
45h Block, Jayanagar,
Bangalore 560 011. .. Petitioner

V/s

1. Union of India
(Through the Sr.Central Govt.Adv.)
Govt.of India, Ministry of Law,
Justice and C.A.Dept.of Legal Affairs,
2nd Floor, Aayakar Bhawan annexe,
New Marine Lines, Mumbai 400 020.

2. Settlement Commission,
Customs & Central Excise,
Additional Bench, 6th Floor,
Utpad Shulk Bhavan,
Bandra Kurla Complex, Bandra (East),
Mumbai 400 051.

3. Commissioner of Customs, Pune
ICE House, 41-A, Sassoon road,
Opp. Wadia College, Pune 411 001. .. Respondents

**WITH**

**WRIT PETITION NO.507 OF 2004**
**(ORDINARY ORIGINAL CIVIL JURISDICTION)**

Union of India
Through Commissioner of Customs,
(Export Promotion), New Custom House,
Ballard Estate, Mumbai 400 038. .. Petitioner

V/s

1. M/s.Bell Granito Ceramica Ltd
506-507, Acme Plaza,
Andheri Kurla Road,
Andheri (East),
Mumbai 400 059.

2. Settlement Commission,
Customs and Central Excise,
Utpad Shulk Bhavan, 7th Floor,
Bandra Kurla Complex,

Bandra (East), Mumbai 400 051. .. Respondents

**WITH**

**WRIT PETITION NO.2379 OF 2004**
**(ORDINARY ORIGINAL CIVIL JURISDICTION)**

Union of India
Through Commissioner of Customs,
(Exports), Air Cargo Complex,
Mumbai 400 099. .. Petitioner

V/s

1. M/s.Express Block and
   Engraving Studio Pvt.Ltd.
   Mustafa Bldg., Sir P.M.Road,
   Fort, Mumbai.

2. The Settlement Commission,
   Customs & Central Excise,
   Utpad Shulk Bhavan, 7th Floor,
   Bandra Kurla Complex,
   Bandra (East), Mumbai 400 051. .. Respondents

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Mr.A.J.Rana, Sr.Counsel with Mr.P.S.Jetley & Mr.K.R.Chaudhary for the Petitioners, AND Mr.D.B.Shroff with Mr.Rustomjee & Ms.Arman Dalal i/by M/s.Croford Bayley & Co. for the Respondents in **W.P.No.115/2004.**

Mr.A.J.Rana, Sr.Counsel with Mr.K.J.Presswala for the Petitioners **AND** Mr.C.Harishankar with Mr.S.N.Kantawala i/by Mr.Yogesh Rohira for the Respondents in **W.P.No.1636/2004 and W.P.No.9995/2004.**

Mr.V.Shreedharan, Sr.Counsel with Mr.Prakash Shah, Mr.Jitu Motwani & Mr.Bharat Raichandani i/by M/s.PDS Legal for the Petitioners **AND** Mr.A.M.Sethna for the Respondents in **W.P.No.4381/2005.**

Mr.C.Harishankar with Mr.S.N.Kantawala i/by Mr.Yogesh Rohira for the Petitioners **AND** Mr.Y.Shinde (Public Prosecutor) for the Respondents in **Criminal Writ Petition No.671/2005.**

Mr.C.Harishankar, Sr.Counsel with Mr.S.N.Kantawala i/by Mr.Yogesh Rohira for the Petitioners **AND** Mr.A.J.Rana, Sr.Counsel with Mr.P.S.Jetley, Mr.H.V.Mehta, Mr.Y.S.Bhate & Mr.Y.R.Mishra for the Respondents **in W.P.No.2430/2004**.

Mr.Madhur Baya for the Petitioners **AND** Mr.A.J.Rana, Sr.Counsel with Mr.P.S.Jetley & Mr.H.V.Mehta for the Respondents in **W.P.No.1051/2005.**

Mr.P.Balakram i/by Mr.V.M.Doiphode for the Petitioners **AND** Mr.A.J.Rana, Sr.Counsel with Mr.K.J.Presswala & Mr.P.S.Jetley for the Respondents in **W.P.No.2/2004.**

Mr.A.J.Rana, Sr.Counsel with Mr.H.V.Mehta & Mr.P.S.Jetley for the Petitioners **AND** Mr.V.Shreedharan, Sr.Counsel with Mr.Prakash Shah, Mr.Jitu Motwani & Mr.Bharat Raichandani i/by M/s.PDS Legal for the Respondents in **W.P.No.507/2004.**

Mr.A.J.Rana, Sr.Counsel with Mr.P.S.Jetley, Mr.S.M.Shah & Mr.Y.R.Mishra for the Petitioners **AND** Mr.V.Shreedharan, Sr.Counsel with Mr.Bharat Raichandani i/by M/s.PDS Legal for the Respondents in **W.P.No.2379/2004.**

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**CORAM: DR.S.RADHAKRISHNAN & J.H.BHATIA, JJ.**

**DATE : 21/07/2005.**

**JUDGMENT: (Per S.Radhakrishnan,J.)**

**1**. In all the above ten Petitions, common issue has been raised with regard to the jurisdiction of the Settlement Commission constituted under Chapter XIV-A of the Customs Act, 1962. The Petitioners in the five Writ Petitions which have been filed by the Union of India representing the Customs Department, have sought to contend that the jurisdiction of the Settlement Commission to entertain any application under Section 127B of the Customs Act, 1962 is very limited in the sense, such an application can be entertained only in case of short levy on account of misclassification or otherwise. On the contrary, the contentions of the Petitioners in the other five Writ Petitions which have been filed by the private parties is that the

jurisdiction of the Settlement Commission constituted under the Customs Act is quite wider and it cannot be restricted in such a narrow manner. On this point of law, the learned Counsel appearing for the Customs Department as well as the learned Counsel appearing for private parties have made their submissions and have cited various judgments in support of their respective submissions.

2. Mr.Rana, the learned Senior Counsel appearing for the Customs Department has sought to argue in Writ Petition No.115 of 2004 on this issue. He pointed out factually in the above writ petition that the Respondents imported duty free raw material as input which was not at all used and could not be used in the manufacture of export products. The contention of the learned Counsel for the Customs Department is that the Respondents in the aforesaid Writ Petition No.115/2004 had availed of various benefits under the DEEC Scheme and evaded huge payment of duty by practicing a systematic fraud over a number of years by manipulation of records. It is also contended by Mr.Rana that the Respondent had shown higher percentage of wastage i.e.almost 12% though admittedly it was not more than 4.16%. It is also the contention of Mr.Rana, that the imported goods were actually sold in violation of the conditions of Licence. Therefore, Mr.Rana, the learned Sr.Counsel has pointed out that the seven show cause notices were issued to the Respondents under Section 111(d), 111(o), 111(m), 112, 113, 114, 114-A and 117 read with Section 28 of the Customs Act. Out of the

seven show cause notices, admittedly, with regard to two show cause notices the amount involved was less than Rs.2 lakhs and hence the Settlement Commission had no jurisdiction to entertain the same. It is the main contention of Mr.Rana that the companies or the persons who evade the customs duty fraudulently, cannot avail of the benefit of approaching the Settlement Commission. Mr.Rana thereafter took us through the provisions of Section 127-A of the Customs Act. Section 127-A(b) defines a "case", reads as under:-

"Case" means any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, or any proceeding by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before a proper officer or the Central Government on the date on which an application under sub-section (1) of Section 127B is made."

3. Mr.Rana also brought to our notice the main provision contained in Section 127B, whereby an application for settlement of cases is made to the Settlement Commission. Section 127-B reads as under:-

127B. Application for settlement of cases:-

(1) Any importer, exporter or any other person (hereinafter in this Chapter referred to as the applicant) may, at any stage of a case relating to him, make an application in such form and in such manner as may be specified by rules, and containing, a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification or optherwise of goods, to the Settlement Commission to have the case settled and such application shall be disposed of in the manner

hereinafter provided:

provided that no such application shall be made unless-

(a) The applicant has filed a bill of entry, or a shipping bill, in respect of import or export of goods, [as the case may be, and in relation to such bill of entry or shipping bill], a show cause notice has been issued to him by the proper officer;

(b) the additional amount of duty accepted by the applicant in his application exceeds two lakh rupees:

Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending in the Appellate Tribunal or any Court:

Provided also that no application under this sub-section shall be made in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), has been committed:

Provided also that no application under this sub-section shall be made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975 (51 of 1975).

(2) Where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under section 110, the applicant shall not be entitled to make an application under sub-section (1) before the expiry of one hundred and eighty days from the date of the seizure.

(3) Every application made under sub-section (1) shall be accompanied by such fees as may be specified by rules.

(4) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

4. Mr.Rana, the learned Counsel for the Customs Department has contended that the application under Section 127B of the said Act can only be made if the Applicant has filed a Bill of Entry with regard to the import of goods (shipping bill in respect of export) and a show cause notice has been issued to him by the proper officer in relation to such a Bill of Entry. Unless these two essential conditions viz. filing of Bill of

Entry as well as issuance of show cause notice, are fulfilled, no party can approach the Settlement Commission. Mr.Rana contended that the word "case" has been defined under Section 127-A(b). He emphasised that, reading the requirement that there should be a "case", a show cause notice referred to therein, would mean a show cause notice under Section 28 of the Customs Act for short levy where there has been no collusion, willful misstatement or suppression of facts except regarding misclassification. Mr.Rana contended that only in case case of short levy such a show cause notice can be issued and there should be no suppression of facts except regarding the misclassification. To put in other words, Mr.Rana contended that in case of mis-diclaration or fraud or any other ground, a party cannot approach the Settlement Commission as the same would not amount to short levy or mis-classification. According to Mr.Rana, in the instant case, the Petitioners had adopted a modus operendi of importing raw material which was not at all used by the petitioners for a long period and the petitioners had willfully evaded payment of duty and when the investigation was started and the show cause notices were issued, the petitioners had approached the Settlement Commission, which the learned Counsel Mr.Rana states, should not be allowed. Mr.Rana states that the jurisdiction of the Settlement Commission is only with regard to the genuine cases of mis-classification either done willfully or otherwise. Therefore, the contention of Mr.Rana is that the jurisdiction of the Settlement Commission is confined only to levy, assessment and

collection of duty and in the case of mis-classification or otherwise which has resulted in short levy. However, accordingly to Mr.Rana, in case of fraud or mis-declaration or suppression of facts, the remedy of approaching the Settlement Commission under Section 127B is not permissible. In that behalf, Mr.Rana referred to Statement of Objects at the time when the said Chapter XIV-A of the Customs Act was brought in by the amended Act 21 of 1998 which came into force from 1st August 1998. In the said statement of objects annexed to the Bill it is mentioned clearly that the Government has decided to provide Chapter XIV-A in the Customs Act to provide setting up of the Customs and Central Excise Settlement Commissions on the lines of a similar Commission already existing under the Income Tax Act, 1961. In the said Bill it is mentioned that the Settlement Commission will also entertain application for settlement of cases relating to the levy, assessment and collection of customs duty, or any appeal or revision in connection with such levy, assessment or collection. Any importer or exporter or any person who has incurred any liability under any law levying duties of customs may make an application in such form and in such a manner as may be prescribed stating interalia a true and full disclosure of his duty liability which has not been disclosed before the proper officer having jurisdiction, the manner in which such liability has been incurred and the additional amount of excise duty accepted to be payable by him. It also provides that such an application will be accepted only where the Applicant has filed a bill of entry or shipping bill

under the Customs Act, 1962. Only cases where show cause notice or demand notice for recovery of duty has been received by the Applicant will be entertained.

5. Mr.Rana thereafter brought to our notice the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax (Central) V/s. B.N.Bhattacharjee and Another, reported in (1979) 4 SCC 121,** wherein the issue with regard to setting up of the Settlement Commission under Chapter XIX-A with regard to recovery of income tax was considered. The relevant part of paragraph No.68 in the aforesaid judgment, reads as under:-

"It is not inappropriate to state that the policy of the law as disclosed in Chapter XIXA is not to provide a rescue shelter for big tax-dodgers who indulge in criminal activities by approaching the Settlement Commission. The Settlement Commission will certainly take due note of the gravity of economic offences on the wealth of the nation which the Wanchoo Committee had emphasised and will exercise its power of immunisation against criminal prosecutions by using its power only sparingly and in deserving cases; otherwise such orders may become vulnerable if properly challenged.:

6. Mr.Rana thereafter referred to the judgment of the Hon'ble Supreme Court in the case of **Commmissioner of Income Tax, Madras V/s. Express Newspapers Ltd., reported in (1994) 2 Supreme Court Cases 374.** Though the aforesaid case was decided by the Supreme Court subsequent to the amendment of 1991, in the said judgment, the Supreme Court was dealing with the case involving a period prior to the amendment of 1991.

Paragraph Nos.19 and 22 of the aforesaid judgment would be relevant which read as under:-

"19. The idea underlying the said words [in the main limb of sub-section (1-A) is self-evident. The disclosure under Section 245-C must be of an income not disclosed before the Assessing Officer. If the Assessing Officer (or the income tax authority) has already discovered it and has either gathered the material to establish the particulars of such income or fraud fully or is at a stage of investigation/enquiries where the material gathered by him is likely to establish the particulars of such income or fraud, the assessee cannot be allowed to defeat or forestall, as the case may be, the entire exercise of the income tax authorities just by approaching the Commission. In such a case, it cannot be said that he is acting voluntarily or in good faith. He should not be allowed to take advantage of the comparatively easy course of settlement. He must be allowed to face the normal channels of assessment/appeal etc. Section 245-C is meant for those assessees who seek to disclose income not disclosed before the Officer including "the manner in which such income has been derived". If the department already knows and has gathered particulars of such income and the manner in which it has been derived, there is no 'disclosure' by the assessee. Let it be remembered that the words in question [in Section 245-D (1-A)] are not words of limitation nor are they meant to help unscrupulous assessees. Chapter XIX-A is a part of the Income Tax Act and must be construed consistent with the overall scheme and object. The chapter is meant for those assessees who want to disclose income not disclosed till then together with the manner in which the said income is derived. It is not meant for those who come after the event, i.e., after the discovery of the particulars of income and its source - or discovery of particulars of fraud perpetrated by the assessee, as the case may be - nor even to those who come to the commission to forestall the investigation/inquiries which have reached a stage where the department is in possession of material which though not sufficient to establish such concealment or fraud, is such that it is likely to establish it - may be some more material is required to establish it fully. The Commission has to keep all this in mind while deciding whether to allow the application to be proceeded before it or to reject it."

"22. If we look at the facts of the case in the light of the legal position adumbrated hereinabove, it would be clear that the application filed by the respondent before the Commission was not maintainable and could not have been allowed to be proceeded with. Firstly, the respondent did not disclose, in its application under Section 245-C, any income which was not disclosed before the Assessing Officer. This was a case where the

respondent was claiming certain losses, which he sought to set-off against its other income. If the respondent's case was true, it would not have been liable to pay any tax for the reason that entire income from property (and other income, if any) would have been swamped by the said losses. Indeed, the loss had to be carried forward to the next year. The case of the Revenue, however, was that all the alleged transactions (from which loss is said to have resulted) were bogus and fictitious ones, fabricated only for the purposes of evading the tax lawfully due on its income. In his application to the Commission, the respondent did not disclose any income not disclosed by him before the Assessing Officer nor did he disclose in his application the manner in which such income was derived. The assessee merely offered a part of the amount (claimed by him as losses) towards taxable income. Thus, his application, not being in compliance with the first and foremost requirement of Section 245-C(1), was not maintainable thereunder. It ought to have been rejected in limine. the Commission had no jurisdictiion to entertain the said application. Secondly, this is a case where the income tax authorities had made extensive investigation and inquiries wherein they had collected voluminous material, which, according to them, established the particulars of concealment of income on the part of the respondent-assessee. It was so held by the Assessing Officer- with whom the first appellate authority agreed, no doubt, subsequent to the filing of the application under Section 245-C but before the passing of the impugned order."

It should be noted here that prior to 1991 amendment, in Section 245D there was a second proviso which provided that the application for settlement shall not be proceeded with if the Commissioner objects to the application being proceeded on the ground that concealment of particulars of income on the part of the Applicant or perpetration of fraud by him for evading any tax has been established or likely to be established by the Income Tax Authorities. To put in other words, if the Commissioner objects to entertaining of such an application, the Commissioner can reject the same. Whereas, subseqnelty this condition of objection by the Commissioner has been deleted by the amendment to Income Tax Act which came into force in 1991.

7. Mr.Rana thereafter referred to another judgment of the Supreme Court in the case of **Kuldeep Industrial Corporation and Others V/s.Income Tax Officer and Others, reported in (1997) 3 SCC 377.** In Paragraph No.14 of the aforesaid judgment the Supreme Court has observed as under:-

"It was a gross case where the assessee brazenly and deliberately perpetrated fraud upon the Revenue with a view to evade the taxes legitimately and lawfully payable by him. The fraud played by him, which was discovered by the Income Tax Officer even by the date of submission of report by the Commissioner, disentitled the assessee from claiming that his case should be admitted for settlement by the Commission. There is neither law in its favour nor equity. The fact that it has admitted its fraud in its application is of no consequence since its fraud was already discovered by the Income Tax Officer by her own extensive and elaborate inquiries."

8. Relying on the aforesaid authorities, Mr.Rana sought to contend that a party who seeks to avail of a remedy of Settlement Commission under the Customs Act, ought to come voluntarily and must come with clean hands. To put in other words, if a party has committed fraud and if he comes to the Settlement Commission after discovery of the fraud, the Commission ought not to entertain such an application. Rana thereafter referred to the judgment of the learned Single Judge of the Madras High Court delivered in the case of **Commissioner of Customs (AIR), Chennai V/s. Cus.& C.Ex.Settlement Commission, reported in 2002 (139) E.L.T.512 (Mad.)** Mr.Rana strongly relied upon the following observations of the learned Single Judge in the aforesaid judgment:-

"There cannot be a dispute that the powers of the Settlement Commission shall be restricted only to some of those areas enumerated under Chapter XIV-A of the Customs Act and not beyond that. Under Section 127A (b) of the Act, "Case" means any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty. Under Section 127B of the Act, any importer, exporter or any other person may, at any stage of a case relating to him make an application to the Settlement Commission in such form and in such manner as may be specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer in respect of which he admits short-levy on account of mis-classification or otherwise of goods. In order to avail the benefit of filing of an application under Section 127A of the Act, an importer, exporter or any other person should first establish that the case pleaded before the Commission is in respect of levy, assessment and collection of customs duty, which may on account of mis-classification or otherwise of goods."

9. Thereafter Mr.Rana relied upon the observations of the learned Single Judge in Paragraph No.13 of the aforesaid judgment, which read as under:-

"Only after the above fact was detected and found out, the second respondent filed the application before the Commission on the ground that there was some mis-classification of the goods. Further it is seen that the second respondent had imported the goods in the name of M/s.Goutham Enterprises without their knowledge and consent. He did not also disclose the goods in the consignment till the same was found out by the department. From the facts as seen above, I am of the view that it is not the case of mis-classification and it is the case of mis-declaration and the case of smuggling.

10. Mr.Rana also relied upon the observations of the learned Single Judge in paragraph No.14, wherein he pointed out that the learned Single Judge referred to

the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax, Madras V/s Express Newspapers Ltd. reported in (1994) 2 SCC 374**, wherein the Supreme Court has dealt with the provision of Section 245A(b) of the Customs Act. Thereafter, Mr.Rana relied upon the observations of the learned Single Judge in Paragraph No.16 of the aforesaid judgment in the case of **Commissioner of Customs (AIR) Chennai V/s.Customs and Central Excise Settlement Commission** referred to hereinabove, wherein the learned Single Judge observed as under:-

"What was held by the Supreme Court in the above judgments is existence of the power of the Settlement Commission to entertain an application from a person who in act of bonafide mis-classified the goods imported and had disclosed the same before the Department even before the Department would investigate and detect the concealment. However, in a case where the concealment itself has not been disclosed, till such time, it was detected by the authorities through a detailed investigation after putting their efforts to find out as to who is the cause for such concealment or smuggling or the fraud played on the department, the importer cannot be considered as a person bonafidely misclassified the goods and thereby resorting to the remedy of settlement by applying to the Settlement Commission. In this case, factually the second respondent did not disclose the mobile phones before the exercise made by the Special Intelligence Investigation Team. The team on investigation found that it was a case of mis-declaration and as an act of smuggling."

Mr.Rana, also brought to our notice the observations of the learned Single Judge in paragraph No.17 of the aforesaid judgment, that the Commission ought not to have entertained the said application as the issue did not relate to the "case" as defined under Section 127A(b) of the Act.

11. Mr.Rana thereafter referred to the Judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax V/s Bhaskar Picture Palace reported in (1999) 9 SCC 232**. The relevant Paragraph Nos.5, 6 and 7 of the aforesaid judgment read as under:-

"5. Clearly, this is a situation where the applications of the respondents were not proceeded with only because of the objection raised by the Commissioner under the said sub-section (1-A). Learned Counsel for the Union of India, however, drew our attention to the format set out prior to the commencement of the afore-quoted order, in which it is, interalia, stated:

"11. Section under which the order is passed : 245-D(1) of the Income Tax Act 1961."

"6. In his submission, the application had, therefore been rejected not only under sub-section (1-A) but also under sub-section (1). The submission has only to be stated to be rejected. It is patent from para 7.1, which we have quoted, that the only reason for not proceeding with the applications was the objection raised by the Commissiioner under sub-section (1-A). This, it being admitted, being the common mode in which the orders were passed, clearly every application was rejected only because of the objection raised by the Commissioner."

"7. Having regard to the fact that the said sub-section (1-A) was removed from the statute book subsequent to 1991, we see no reason why the Settlement Commission could not have entertained applications, the like of which had not been proceeded with therefore only by reason of the objections of the Commissioner, and no convincing argument has been advanced on behalf of the Union of India in this context except to submit that the Settlement Commission did not have the power of review and that the grounds in regard to review were not satisfied. This is not a case of review at all. It is a case of fresh applications made subsequent to the amendment of the section concerned in 1991 when the objection of the Commissioner was not to be called for or taken into account."

A perusal of the paragraph Nos.5, 6 and 7 of the aforesaid judgment clearly indicate that the observations of the Supreme Court in fact assist the Respondents inasmuch as the Supreme Court has clearly

held that even in case where the application made to the Settlement Commission is rejected and subsequently the changed position in law in 1991 wherein the provisions with regard to objection was removed, a party is again entitled to file a fresh application with regard to the very same assessment year. To put in other words, even when the Income Tax Department thinks the case to be of serious concealment and fraud, and as the embargo of Commissioner's objection was removed, the Supreme Court has categorically held that the application after amendment in 1991 was valid and can be entertained.

12. Mr.Rana referred to another judgment of the Supreme Court in the case of **Commissioner of Customs (Import), Mumbai V/s Jagdish Cancer & Research Centre** reported in **2001 (132) ELT 257 (SC),** wherein he relied upon Paragraph No.11, which deals with the distinction between Section 28 and Section 125 of the Customs Act. Mr.Rana thereafter referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of **N.B.Sanjana, Assistant Collector of Central Excise, Bombay and Ors V/s. The Elphinstone Spinning and Weaving Mills Co.Ltd.- AIR 1971 Supreme Court 2039**. The relevant paragraph Nos.23 and 25 of the said judgment read as under:-

"23. Applying the above principles to the case on hand, the expression "paid" in Rule 10 can be reasonably read as "ought to have been paid". Similarly, even in cases where there has been a nil assessment due to one or other of the circumstances mentioned in Rule 10 and if subseqnently it is found that duty is payable, then the entire amount of duty should be considered to have been short-levied. The literal meaning of the expression

"paid" as actually paid in cash has again not been adopted by the Court of Appeal in (1968) 1 QB 487. Having regard to the context in which the said expression appeared in the particular provision which came up for interpretation, the Court of Appeal construed the expression to mean "contracted to be paid". Therefore, the contention of Mr.Daphtary that the expression "paid" should be construed as "ought to have been paid" and even when no duty has been assessed, the entire duty when subsequently assessed will be a short-levy, which is also supported by the decision of this Court in (1963) 3 SCR 893 - (AIR 1963 SC 1062), has to be accepted. If follows that in order to attract Rule 10, it is not necessary that some amount of duty should have been assessed and that the said amount should have also been actually paid. That provision will apply even to cases where there has been a nil assessment in which case the entire duty later on assessed must be considered to be the duty originally short-levied. There is also no difficulty in calculating the period of three months. As pointed out above, the Act and the Rules provide very elaborately the stage and the time when the duty is to be paid and if that is so that must be considered to be the stage or time when the duty ought to have been paid and if so the period of three months will run from the time when the duty ought to have been paid."

"25. We may point out that if the contention of Dr.Syed Mohammed that in order to constitute short-levy, some amount should have been assessed as payable by way of duty so as to make R.10 applicable, is accepted the result will be rather anomalous. For instance if due to collusion (which means collusion between a party and an officer of the Department) a sum of Rs.2/- is managed to be assessed by way of duty when really more than thousand times that amount is payable and if the smaller amount of duty so assessed has been paid, the Department will have to take action within three months for payment of the proper amount of duty. On the other hand, if due to collusion again an order of nil assessment is passed, in which case no duty would have been paid, according to the appellants Rule 10-A will apply. We do not see any reason to distinguish the above two cases one from the other. Both are cases of collusion and if an assessee in collusion manages to have a petty amount of duty assessed and paid he can effectively plead limitation of three months under Rule 10. Whereas in the same case of collusion where no duty has been levied there will be no period of limitation. In our opinion, that will not be a proper interpretation to be placed on R.10-A by us. By the interpretation placed by us on Rule 10, the position will be that an assessee who has been assessed to a smaller amount as well as an assessee who has been assessed to nil duty will all be put on a par and that is what is intended by Rule 10."

A perusal of the above observations of the Supreme

Court, clearly indicate that the judgment would support the private parties inasmuch as the Supreme Court has clearly held that even in case of Nil Assessment, the application before the Settlement Commission would be maintainable. Even the Nil assessment would come within the definition of a short-levy.

13. Mr.Rana thereafter contended that the words "or otherwise" which occur in Section 127B after the words "short levy on account of misclassification" would mean similar acts like misclassification. The learned Counsel contended that the principle of **ejusdem generis** would apply. In that context, he referred to the judgment of the Hon'ble Supreme Court in the case of **George Da Costa V/s Controller of Estate Duty, Mysore - AIR 1967 SC 849**. **In** paragraph No.6 of the aforesaid judgment, the Hon'ble Supreme Court has observed as under:-

"The second part of the section has two limbs: the deceased must be entirely excluded (i) from the property, and (ii) from any benefit by contract or otherwise. It was argued for the appellant that the expression "by contract or otherwise" should be construed ejusdem generis and reference was made to the decision of Hamilton, J. in 1911-2 KB 688. On this aspect of the case we think that the argument of the appellant is justified. In the context of the section the word "otherwise" should, in our opinion, be construed ejusdem generis and it must be interpreted to mean some kind of legal obligation or some transaction enforceable at law or in equity which, though not in the form of a contract, may confer a benefit on the donor."

14. Thereafter, Mr.Rana referred to another judgment of the Hon'ble Supreme Court in the case of **Kamlesh Kumar Sharma V/s.Yogesh Kumar Gupta & Ors. - AIR 1998 SC**

**1021,** on the same principle of ejusdem generis to interpret the words "or otherwise", wherein in Paragraph No.14, the Hon'ble Supreme Court has observed as under:-

"We have no hesitation to say that any appointment to be made on a vacancy occurring in the succeeding year in question for which there is no advertisement under the provisions of sub-section (4) of Section 12, the person on the panel list of preceding academic year in question, cannot be absorbed or be appointed. The word "otherwise" has to be read as ejusdem generis that is to say in group similar to death, resignation, long leave vacancy, invalidation, person not joining after being duly selected."

15. Mr.Rana referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of **Luxmi Tea Company Limited V/s. Pradip Kumar Sarkar - 1989 Suppl.2 Supreme Court Cases 656** to contend that the words "or otherwise" should take colour from the context in which they are used. Mr.Rana thereafter referred to another judgment of the Hon'ble Supreme Court in the case of **Mansukhlal Dhanraj Jain and Ors V/s.Eknath Vithal Ogale - (1995) (2) SCC 665** to contend that there is a distinction between the words "relating to" and "for". To put in other words, the learned Counsel Mr.Rana contended that for the word used "for" the scope will be limited whereas for the words used "relating to" the scope would be wider. In that context he relied upon the observations of the Supreme Court in paragraph No.14 of the said judgment, wherein, it has been observed as under:-

"However, on the clear language of the section, in our view, it cannot be said that these suits are not relating to the possession of the immovable property. It is pertinent to note that Section 41 (1) does not employ the words "suits and proceedings for recovery of

possession of immovable property". There is a good deal of difference between the words "relating to the recovery of possession" on the one hand and the terminology "for recovery of possession of any immovable property". The words ‘relating to are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegaly recover possession from the plaintiff licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the wide sweep of the words "relating to recovery of possession" as employed by Section 41(1)."

16. Mr.Rana thereafter contended that the Settlement Commission as provided under Chapter XIV-A of the said Act would have limited jurisdiction, in the sense only in case of short levy on account of misclassification or otherwise, the Commission would have jurisdiction and not other cases. He also strongly contended that the Commission can have jurisdiction only in case the show cause notice is issued under Section 28 of the said Act and not in the cases wherein show cause notices are issued under Sections 111, 112, 113, 114, 115, 116, 117, 119, 120 and 121 of the Act. He also contended that a show cause notice issued under Section 124 for confiscation of goods or imposition of penalty and involving aforesaid Sections will not be a show cause notice for levy, assessment and collection of duty, and in case of such a show cause notice, the Settlement Commission ought not to interfere. Even if the notice under Section 124 of the said Act is issued the Commission would not have jurisdiction since the cases of confiscation are of serious fraud or smuggling. Mr.Rana contended that the Settlement Commission is meant only for the purpose which have misclassification

either intentionally or knowingly or willfully but not in the cases of fraud or misdeclaration. Under these circumstances, Mr.Rana relying upon the judgment of the learned Single Judge of the Madras High Court, contended that the Settlement Commission ought not to have entertained the application wherein the fraud is involved or misdeclaration is involved or wherein the confiscation notice has been issued. Mr.Rana has contended that the Settlement Commission ex-facie does not have jurisdiction at all to entertain the application. It is not that the Settlement Commission can entertain and thereafter reject the same. The contention is that the Settlement Commission does not even have the jurisdiction to look at these complaints in such cases. The complaints will have to be thrown out at the threshhold even without considering the merits of the applications.

17. Mr.Shroff, the learned Counsel for the Respondents in Writ Petition No.115 of 2004 pointed out that the first Respondent- Hoganas (India) Ltd. used to import a particular type of iron powder viz."HGRGSI". which was not used in the final product that was exported, as the same was incapable of being so used. It is the contention of the learned Counsel Mr.Shroff that the same was used in the manufacture of the exported Iron Powder, but not to the extent declared. He has also contended that the 1st Respondent had been allowed a wastage norm of 12% by the Advance Licensing Input-Output Norms Committee. Thus, the 1st Respondent was permitted to import 112% of the output in each case.

Mr.Shroff however contended that in the show cause notice it was alleged that the actual wastage was only 4.16% and that the 1st Respondent had thus wrongly imported an additional amount of the raw material without payment of duty. Mr.Shroff has contended that the 1st Respondent thereafter voluntarily offered to pay an additional duty on the basis of a wastage norm of only 1% in view of certain proceedings before the Advance Licensing Committee, New Delhi, and this was done voluntarily by the 1st Respondent by way of an affidavit before the Settlement Commission, even without the Department raising the said issue. Mr.Shroff contended that the Board of Directors of the Company were not aware of the fraud committed by some of its employees and the moment when the Board of Directors became aware of the same, they immediately took remedial steps and in fact terminated the services of the then Managing Director and voluntarily deposited an amount of Rs.357.45 lakhs which was virtually the entire duty computed on the imports made from the three ports during the last nine years, without even requesting that a show cause notice be issued.

18. Mr.Shroff while dealing with the scope of Section 127A(b) of the Customs Act, sought to contend that the application must be for settlement of a case viz. any proceding under the Customs Act or any other Act for levy, assessment and collection of customs duty, or any proceeding by way of an appeal or revision in connection with such levy, assessment or collection, which may be

pending before the proper officer of the Central Government on the date on which the application under sub-section (1) of Section 127B is made. While dealing with the scope of Section 127B(1) of the Customs Act, Mr.Shroff has contended that the application must contain full and true disclosure of the duty liability which has not been disclosed before the proper officer, and it should also contain the manner in which such liability has been incurred, and so also the additional amount of customs duty accepted to be payable by the applicant, and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which the applicant admits short levy on account of misclassification or otherwise of goods.

19. Mr.Shroff thereafter contended that if one were to look to the provisions of Section 127B, it is explicitly clear that what is mandatory is that there must be a bill of entry or a shipping bill in respect of import or export of goods, and there must be a show cause of notice being issued by the proper officer in relation to such a bill of entry or shipping bill. He has submitted that the party concerned must make full and true disclosure of his duty liability which has not been disclosed before the proper officer, and the manner in which such liability has been incurred and the additional amount of customs duty accepted to be payable by him. Referring to the said provision of Section 127B, Mr.Shroff has further contended that the application must contain **such other particulars as may**

**be specified by rules** including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification or otherwise of goods. Mr.Shroff however contended that till date there are no rules framed under Section 127B, which fact, is not even disputed by Mr.Rana, the learned Counsel for the Department. In fact, such particulars as provided by the wording of Section 127B including particulars of dutiable goods in respect of which the Applicant admits short levy on account of misclassification or otherwise of goods, will have to be provided by specified rules. Mr.Shroff contended that this portion of Section 127B is only a provision to indicate if rules were to be framed. Mr.Shroff contended that this does not in any manner restrict the jurisdiction of the Settlement Commission as sought to be argued by the learned Counsel Mr.Rana. Mr.Shroff contended that there is no dispute that in the instant case a bill of entry was duly filed and the show cause notices were already issued and thereafter the applications were made under Section 127B. Mr.Shroff contended that the arguments of the learned Counsel for the Department that the Settlement Commission has jurisdiction only with regard to short levy arising out of misclassification of goods and the Settlement Commission will have no jurisdiction in the cases involving smuggling, misdeclaration and any willful attempt to evade payment of customs duty or even involving non-levy of duty, is not sustainable. He contends that if such a narrow and restricted meaning is given, the Settlement Commission will loose its utility and nobody will approach the Commission for settling the

cases. Mr.Shroff sought to contend that the wording of the aforesaid provision that "the short levy on account of misclassification **or otherwise**" would clearly mean short levy arising on account of misclassification or otherwise. According to him the words **"or otherwise"** should be given wider meaning and not a narrow meaning applying the principle of ejusdem generis.

20. Mr.Shroff thereafter referred to and relied upon the judgment of the Supreme Court in the case of **N.B.Sanjana, Assistant Collector of Central Excise, Bombay & Ors. V/s The Elphinstone Spinning and Weaving Mills Co.Ltd. - 1978 (2) ELT 399** (SC). Referring to the aforesaid judgment, the learned Counsel submits that the said judgment in fact assists the Respondents wherein in no uncertain terms the Supreme Court has come to the conclusion while interpreting Rule 10 that even when there is nil assessment, the Commission whould have jurisdiction. Mr.Shroff has contended that the argument of the learned Counsel for the Department that the nil assessment would not come within the meaning of a short levy, cannot be tenable. On the contrary, Mr.Shroff submits that the Supreme Court has categorically held that even a nil assessment would come within the meaning of a short levy as well as non-levy. Mr.Shroff contended that Section 127B does not in any manner indicate that the Settlement commission ought not to entertain any aapplication with regard to fraud or wilful misdeclaration or even smuggling. He contended that this Court ought not to incorporate the words in Section 127B to exclude the Settlement Commission’s

jurisdiction by stating that when there is a fraud, misdeclaration or smuggling the Commission has no jurisdiction. He submits that the wording of Section 127B is explicitly clear, and what is mandatory is that there should be a bill of entry and there should be a show cause notice with regard to the said bill of entry being issued by a proper officer. There are no other essentials which have been prescribed. Mr.Shroff has contended that that the argument of the learned Counsel for the Department that if any confiscation notice is issued under Section 124 of the Customs Act the Commission ought not to have jurisdiction, is totally unsustainable. In that context he referred to the **Form** prescribed under the Customs (Settlement of Cases) Rules 1999. In clause 9 of the said prescribed Form, it provides for the particulars such as **"Date of Seizure, if any".** To put in other words, the seizure can only occur if there is confiscation. The seizure takes place only if there is reasonable belief that it is liable to be confiscated. Clause 6 of the aforesaid Form provides for such particulars as to details of Bill of Entry/Shipping Bill filed in relation to the case for settlement. Under clause 10, the said Form provides for the brief facts of the case and particulars of the issued to be settled, and under Clause 11 the said Form provides for the details as to the total amount of duty involved in the dispute. Under clause 12 of the said Form, the details as to the additional amount of duty discolsed and accepted as payable are required to be given.

21. Mr.Shroff brought to our notice the Annexure to the said Form. Clause 3 of the said Annexure to the Form, requires for the particulars as to the duty liability accepted out of the total duty demanded in the show cause notice, if any, issued and the manner in which such duty liability has been derived. The said Annexure to the aforesaid Form, only contemplates four items. A perusal of the said Form and the Annexure, indicates that what is sought is the information regarding the Bill of Entry/Shipping Bill, details regarding additional amount of duty disclosed and accepted to be payable, and the full and true disclosure of the facts regarding the issues to be settled including the terms of settlement sought for by the Applicant. Mr.Shroff contended that the Form clearly indicates that the scope of the Settlement Commission under Section 127B is not restricted as sought to be contended by the learned Counsel for the Department.

22. Mr.Shroff contended that the judgment in the case of **N.B.Sanjana, Assistant Collector of Central Excise, Bombay and Others V/s.the Elphinstone Spinning and Weaving Mills Co. Ltd. - AIR 1971 SC 2039** referred to and relied upon by the learned Counsel for the Department, in fact, fully supports the case of the private parties. Even in case of a nil assessment, the same would come within the meaning of a short levy or non levy. As far as judgment of the Supreme Court in the case of **Commissioner of Income Tax, Madras V/s. Express Newspapers Limited - (1994) 2 SCC 374** Mr.Shroff has contended that the said judgment was dealing with

the cases pertaining to the period prior to the amendment of 1991. The Supreme Court was in fact not dealing with the law as amended from 1991 and as such, Mr.Shroff contended that the observations of the Supreme Court in the said judgment will be of no assistance to the Department. Mr.Shroff contended that the judgment of the Supreme Court in the case of **Commissioner of Income Tax V/s Bhaskar Picture Palace** - (**1999) 9 SCC 232**, in fact, helps the private parties, in the sense, the application which was rejected earlier by the Settlement Commission was allowed to be revived afresh in view of the changed position of law after 1991. Mr.Shroff, the learned Counsel for the Respondents has pointed out that the object of providing such Settlement Commission or such provisions is to unearth the black money. The Supreme Court in the case of **R.K.Garg V/s.Union of India & Others - (1981) 4 SCC 675** has observed as under:-

"The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" ; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture V/s.Central Reig Refining Company, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is

not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

23. Mr.Shroff thereafter referred to and relied upon the judgment of our High Court in the case of **All India Federation of Tax Practitioners and Another V/s.Union of India & Others - 1997 (228) ITR 68**, wherein, this Court has observed as under:-

"However, considering the present social and economic scenario in the country, it cannot be said that the Government was having other alternative, efficacious remedy and yet it has selected this method to unearth unaccounted money. Admittedly, there is manifold increase in unaccounted money and wealth. Despite stringent taxation laws, as stated earlier, for various reasons, it appears that it is not possible for the executive to unearth unaccounted money. In such a situation, if Parliament decided to give some inducement to holders of black money and allow them to join the mainstream by disclosing their unaccounted income, it cannot be said that the impugned legislation is so reeking with immorality that it could be condemned as aribtrary or irrational."

It may be noted here that the aforesaid judgment of the Bombay High Court was upheld by the Hon’ble Supreme Court in the case of **All India Federation of Tax Practioners and Another V/s Union of India & Ors.- (1998) 231 ITR 24.** Mr.Shroff also brought to our notice

that the Delhi High Court has also dealt with such a scheme in the case of **All India Federation of Tax Practitioners V/s.Union of India - 1998 (104) ELT 595 (Del.)** to unearth the black money.

24. The learned Counsel Mr.Harishankar who is appearing for the private parties in four of the Writ Petitions, sought to contend that the Revenue's stand that the Settlement Commission's jurisdiction is excluded if show cause notice is issued under Section 124 of the Act, cannot be sustained. He strongly relied upon the judgment of the Supreme Court in the case of **Commissioner of Customs V/s Jagdish Cancer & Research Centre - 2001 (132) ELT 257 (SC),** wherein the Supreme Court has clearly observed that the order for payment of duty under Section 125(2) of the Act would be an integral part of the proceedings relating to the confiscation and consequential orders thereon on the ground as in that case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. Therefore, the learned Counsel Mr.Harishankar contends that all cases of confiscation are relatable to Section 124 and not to Section 28, and it is very important to note that there is an option of redemption by paying the redemption fine under Section 125 of the said Act. In that context, he referred to Section 127H of the said Act which clearly impowers the Settlement Commission to interfere with the redemption fine imposed. Cases of confiscation, are, therefore, statutorily brought within

the jurisdiction of the Settlement Commission. It is the contention of Mr.Harishankar that if one were to analyse the jurisdiction of Settlement Commission and were to restrict it to show cause notice under Section 28 then there is no need for providing Section 127 H whereby the Commission can even interfere with regard to redemption fine which can be imposed under Section 125. Therefore it is the contention of Mr.Harishankar that the very provision of Section 127H makes it clear that even the cases of confiscation would come within the perview of Settlement Commission. Therefore, logically even the notice issued under Section 124 will have to be covered since the notice under Section 124 of the Act is for the purpose of confiscation. Referring to the judgments in the case of **CIT V/s Express Newspapers Ltd. - (1994) 2 SCC 374** and in the case of **Kuldeep Industrial Corporation V/s I.T.O.- 1997 (3) SCC 377,** Mr.Harishankar submitted that the Settlement Commission could not entertain the application in view of the objection of the Commissioner which law was then prevalent. Subsequently, the law was amended in the year 1991. He, in fact, brought to our notice the observations in paragraph No.15 of the said judgment in the case of **Express Newspaper's** case. The Supreme Court though considering the case in the year 1994, but with regard to the period prior to 1991 was fully aware of the merit of the said amendment. The observations of the Hon'ble Supreme Court in paragraph No.15 of the aforesaid judgment read as under:

"It is not necessary to notice the effect of the above legislative change brought about in 1991".

That is to say, as the Supreme Court was not concerned with the amended law, as in that case of Express Newspapers, the Supreme Court was dealing with the case pertaining to the assessment years prior to 1991.

25. Referring to the judgment in the case of **CIT V/s Bhaskar Picture Palace - 1999 (9) SCC 232,** Mr.Harishankar has pointed out that the Supreme Court has clearly held to the contrary as it was dealing with the post-1991 case that "the batch of cases concerns Section 245-D of the Income Tax Act, 1961 as it stood prior to 1991 and thereafter". It is pointed out by Mr.Shroff that the judgment in the case of **Bhaskar Picture Palace** in fact assist the private parties and not the Department. Mr.Harishankar laid emphasis with regard to the definition of "case" under Section 127A(b) and contended that the case would mean any proceeding for the purpose of levy, assessment and collection of customs duty, or any proceeding by way of an appeal or revision in connection with levy, assessment or collection of customs duty. above. To put in other words, Mr.Harishankar has contended that it is not that the levy, assessment and collection are interconnected as contended by Mr.Rana. In that context he referred to and relied upon the judgment of the Punjab High Court in the case of **Firm L.Hazari Mal V/s.I.T.O. - AIR 1957 Punjab 5,** wherein, the Punjab High Court has held that the three expressions ‘levy’, ‘assessment’ and

'collection' are of the wider significance and embrace in their broad sweep all the proceedings for raising money by the exercise of the power of taxation. The Bench has observed as under:-

"Now, what exactly is the meaning of the expression "levy, assessment and collection" which appears in section 13 of the finance Act? To "levy" a tax means "to impose or assess" or "to impose, assess or collect under the authority of law." It is a unilateral act of superior legislative power to declare the subjects and rates of taxation and to authorise the Collector to proceed to collect the tax. "Assessment" is the official determination of liability of a person to pay a particular tax. "Collection" is the power to gather in money for taxes, by enforced payment if necessary. The levy of taxes is generally a legislative function; assessment is a quasi-judicial function and collection an executive function. These three expressions "levy", "assessment" and "collection" are of the widest significance and embrace in their broad sweep all the proceedings which can possibly be imagined for raising money by the exercise of the power of taxation from the inception to the conclusion of the proceedings."

The above judgment was approved by the Constitution Bench of the Hon'ble Supreme Court in the case of **A.N.Lakshman Shenoy V/s.I.T.O. - AIR 1958 SC 795**.

26. Mr.Harishankar thereafter referred to and relied upon the judgment of the Supreme Court in the case of **Maqbool Hussain V/s State of Bombay - 1983 (13) ELT 1284 (SC)** wherein in paragraph No.18 the Hon'ble Supreme Court has observed as under:-

"Consfication is no doubt one of the penalties which the Customs authorities can impose but that is more in the nature of proceedings in rem than proceedings in personam, the object being to confiscate the offending goods which have been dealt with contrary to the provisions of the law and in respect of the confiscation also an option is given to the owner of the goods to pay in lieu of confiscation such fine as the officer thinks

fit. All this is for the enforcement of the levy of and safeguarding the recovery of the sea customs duties."

27. Mr.Harishankar referred to and relied upon another judgment of the Supreme Court in the case of **Badaku Joti Savant V/s State of Mysore - 1978 (2) ELT 323 (SC),** wherein the Hon'ble Supreme Court has observed as under:-

"The main purpose of the Act to levy and collect excise duties and Central Excise Officers have been appointed thereunder for this main purpose. In order that they may carry out their duties in this behalf powers have been conferred on them to see that duty is not evaded and persons guilty of evasion of duty are brought to book. Section 9 of the Act provides for punishment which may extend to imprisonment upto 6 months or to fine upto Rs.2000 or both where a person contravenes any of the provisions of a notifiation issued under Section 6 or of Section 8 or of a rule made under Clause (iii) of sub-section (2) of Section 37; (b) evades the payment of any duty payable under the Act; (c) fails to supply any informatiion which he is required by rules made under the Act to supply or supplies false information; and (d) attempts to commit or abets the commission of any of the offences mentioned in Clauses (a) and (b) above. Under Section 13 of the Act, Central Excise Officer duly empowered by the Central Government in this behalf may arrest any person whom he had reason to believe to be liable to punishment under the Act. Section 18 lays down that all searches made under the Act or any rules made thereunder and all arrests made under the Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 relating respectively searches and arrests made under that Code. Section 19 lays down that every person arrested under the Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station. These sections clearly show that the powers of arrest and search conferred on Central Excise Officers, are conferred on Central Excise Officers, are really in support of their main function of levy and collection of duty on excisable goods."

Mr.Harishankar contended that the very purpose of such coercive power is to levy and collect duty. Mr.Harishankar contended that even the proceeding for confiscation and redemption would also involve assessment and collection of duty. In support of this contention, Mr.Harishankar has referred to and relied

upon the judgment of the Supreme Court in the case of **Mohan Meakin Ltd. V/s C.C.E.- 2000 (115) ELT 3 (SC)** wherein the Supreme Court while dealing with Section 125 of the Act has observed as under:-

"Section 125 of the Act empowers the authorities after adjudication to release the goods to the person from whose possession the same has been seized, on collection of redumption fine in lieu of confiscation. But such redemption of the goods is subject to the owner being called upon to pay any duty and charge that is payable in respect of such goods. The proviso to Section 125 (1) also makes it obligatory on the adjudging authority to evaluate the fine which shall not exceed the market price of the goods confiscated. Therefore, there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy on sub-clause (1) of that Section."

28. Analysing the scope of Section 127-B of the Customs Act, Mr.Harishankar has contended that the application should contain the following:- .

a) a full and true disclosure of duty liability, which has not been disclosed before the proper officer,

b) the manner in which such liability has been incurred,

c) The additional amount of duty accepted to be payable by the Applicant, and

d) Such other particulars as may be specified by rules.

To put in other words, the first three are the essential

conditions and the last (forth) condition for "such other particulars as may be specified by rules" will be in accordance with the specified rules. There is no dispute that till today, no rules have been framed in that regard. As such, to deal with the short levy due to misclassification or otherwise would be rather academic till such time the specific rules are provided. There is no need to go into the above aspect at all.

29. Mr.Harishankar, the learned Counsel has further contended that the jurisdiction of the Settlement Commission is determined by the opening words of Section 127-B(1) and not the rest of the sub-section which is purely procedural in nature and only provides for such other particulars as may be specified by rules. While dealing with the words "or otherwise" appearing in Section 127B of the Customs Act, Mr.Harishankar has contended that, by use of the words "or otherwise" the Legislature has extended the jurisdiction of the Settlement Commission to cover all possible cases, and there can be no question of limiting these words or reading them either **ejusdem generis** or **noscitur a sociis** with the word "misclassification". Therefore, according to Mr.Harishankar, that the submission of the learned Counsel for the Department, that the words "or otherwise" appearing in Section 127B have to be read **ejusdem generis** or **noscitur a sociis** with the word misclassification, cannot be sustained. He has contended that the words "or otherwise" will have to be construed in a wider manner and not in a narrow manner. In support of his submission, Mr.Harishankar has

referred to and relied upon the judgment of the Supreme Court in the case of **Lilavati Bai V/s.State of Mysore - AIR 1957 SC 521** and another judgment in the case of **Western India Plywood V/s.P.Ashokan - (1997) 7 SCC 638**. The judgment in the Lilavati Bai (supra) has been followed by this Hon'ble Court in the case of **Abdulgafar A.Nadiadwala V/s.Assistant Commissioner of Income Tax - 2004 (267) ITR 488**. Referring to the aforesaid cases, Mr.Harishankar has contended that the principle of **ejusdem generis** have no application at all, as the single expression "misclassification" cannot constitute a genus.

30. Mr.Harishankar has contended that whenever a show cause notice is issued to a party, apparently, the Department was aware of either concealment or fraud on the part of the importer and therefore a show cause notice is issued, and as such, to contend that the Applicant must approach the Settlement Commission at the stage when the Department is unaware of Applicant's duty liability, would lead to an innocuous situation since the very provision under Section 127-B (1) contemplates that there must be a Bill of Entry and in relatin to such a bill of entry a show cause notice has been issued by a proper officer. If the Department were to be totally unaware then there cannot be any show cause notice. The learned Counsel Mr.Harishankar contended that after the show cause notice is issued, a party discloses all particulars and true facts and approaches the Settlement Commission. Therefore, the contention that the Department should be totally unaware of fraud

or misdeclaration or smuggling itc., cannot be sustained. He also emphasised that this Court ought not to legislate by incorporating the words which are not found under Section 127B in the sense, this Court ought not to exclude the cases involving fraud, smuggling, misdeclaration.

31. Mr.Harishankar further submitted that the powers of Settlement Commission under Chapter XIV-A are exhaustive. Referring to the provisions of Section 127-C(1) of the Customs Act, Mr.Harishankar has contended that even at the initial stage after receiving application, the Settlement Commission calls for report from the Commissioner concerned, and at that stage, on the basis of the materials contained in the report and having regard to the nature and circumstances of the case or the complexity of the investigation involved theirin, it is open to the Settlement Commission, even at a preliminary stage, to reject the application after hearing the Applicant. Mr.Harishankar has submitted that under the provisions of Section 127-C(3) In the event the Settlement Commission allows the application, the Applicant will be directed immediately to pay the admitted additional duty within a period of 30 days. He also brought to our notice the provisions of Section 127-C(6), whereunder, if the application is allowed to be proceeded with, the Settlement Commission may call for the relevant records from the jurisdictional Commissioner and after examination thereof, may direct the Commissioner (Investigation) to make such further enquiry or investigation, if it is of the opinion that

the further enquiry or investigation is necessary. It is vital to note here that, such enquiry or investigation need not be restricted only to the matters covered under the Application but can extend to any other matter relating to the case, as can be seen from the provisions of Section 127-C(6).

32. Referring to the provisions of Section 127-C(7), Mr.Harishankar has pointed out that, after examining the material before it, the Settlement Commission can examine the further evidence, either placed before it or obtained by it suo motu. Mr.Harishankar pointed out this power of the Settlement Commission under the provisions of Section 127-C(7) to requisition evidence on its own motion and examine the same is not even vested with the adjudicating authority. He brought to our notice that the Settlement Commission has complete power to pass such order as it thinks fit, and the same is not limited to the matter covered by the application but extends to any other matter relating to the case not covered by the application, referred to in the report either of the jurisdictional Commissioner or of the Commissioner (Investigation). He also pointed out that if the Settlement Commission finds that the order of settlement had been obtained by fraud or misrepresentation of facts, the order of settlement would become void as provided under Section 127-C(9). Thereafter he pointed out the provisions of Section 127-C(11) wherein the Settlement Commission after declaring that the Settlement has become void, would direct the original authority to proceed with the

regular assessment, thus the proceedings would stand revived from the stage at which the application was allowed to be proceeded with.

33. Referring to the provisions of Section 127-D of the Customs Act, Mr.Harishankar has pointed out that the Settlement Commission has been conferred with the jurisdiction to order provisional attachment of the applicant's property to secure the interests of the Revenue. Even in suspect cases, where the Settlement Commission feels that the interests of the Revenue may be jeopardized during the pendency of the settlement application, it can order provisional attachment of the applicant's property, and this power of attachment of property, too, is not possessed by any adjudicating authority. Referring to the provisions of Section 127-E of the Customs Act, Mr.Harishankar has pointed out that the Settlement Commission can open the completed proceedings for proper disposal of the case before it. According to him, this power, too, is not vested by any adjudicating authority. In support of this submission, Mr.Harishankar has referred to and relied upon the judgment of the Supreme Court in the case of **Commissioner of Income Tax V/s Paharpur Cooling Towers Pvt.Ltd.- (1996) 8 SCC 154,** wherein the Supreme Court has held as under:-

"Section 245E, which is the sheet anchor of the majority opinion, empowers the Commission to reopen any completed proceedings connected with the case before it but this power is circumscribed by the requirement expressly stated in the section that such reopening of completed proceedings should be necessary or expedient for the

proper disposal of the case pending before it. There are two other limitations upon this power, viz. that this reopening of the completed proceedings can be done, even for the aforesaid limited purpose, only with the concurrence of the assessee and secondly that this power cannot extend to a period beyond eight years from the end of the assessment year to which such proceeding relates. These two features make it abundantly clear that the section contemplates reopening of the completed proceedings not for the benefit of the assessee but in the interests of the Revenue. It contemplates a situation where the case before the commission cannot be satisfactory settled unless some previously concluded proceedings are reopened which would normally be to the prejudice of the assessee."

34. Referring to the provisions of Section 127H(1) of the Customs Act, Mr.Harishankar has pointed out that the Settlement Commission is empowered to grant immunity from prosecution, fine and penalty, and that this power is discretionary. He emphasised that the immunity is not granted as a matter of course. He has stated that the immunity may be granted only if there is a full and true disclosure of duty liability by the Applicant, and even in such a case, there is no mandate on the Settlement Commission to grant immunity; the power remains entirely discretionary, though the discretion, no doubt, has to be exercised judiciously, and not capriciously. The proviso to Section 127H (1) makes it clear that such immunity cannot be granted when the prosecution proceedings have been already instituted before filing of the application by the Applicant. Under Section 127-H (3) the Settlement Commission can even withdraw the immunity at a later stage if it feels that the applicant either concealed any material particulars before it, or gave false evidence. Similarly, under Section 127-I (1) if the Settlement Commission at any stage finds non-coperation by the Applicant, the Settlement Commission has jurisdiction to

send the matter back for adjudication. Therefore, the contention of Mr.Harishankar is that the Settlement Commission has absolute jurisdiction to reject the application for settlement on a variety of reasons, including the "circumstances and nature of the case" or the "complexity" thereof, and such power is virtually unfettered. Therefore, the submission of the learned Counsel Mr.Harishankar is that, that this Court ought not to construe the jurisdiction of the Settlement Commission in a narrow manner as various safeguards have already been provided under Chapter XIV-A. According to him, restricting the jurisdiction of the Settlement Commission by such a narrow interpretation, would, in fact, highly be prejudicial and against the public interest.

35. Mr.Harishankar, the learned Counsel appearing for the private parties, while dealing with the submissions of the learned Counsel Mr.Rana for the Department with regard to the judgment of the Madras High Court in the case of **C.C. V/s.Customs & Central Excise Settlement Commission - 2002 (139) ELT 512** (Mad.), has contended that the entire judgment of the Madras High Court was based on the decisions of the Hon'ble Supreme Court in the case of **Express Newspaper** case as well as in the case of **Kuldeep Industrial Corporation**. According to the learned Counsel, in both the above cases, the Supreme Court was dealing with the situation as it was before 1991 and with regard to the issue pertaining to the year prior to 1991, that is to say prior to the amendment of the Income Tax Act in the year 1991. The

learned Counsel brought to our notice that the Madras High Court appears to have erroneously observed in paragraph No.14 of its judgment referring to Section 245A(b) of the Customs Act whereas it ought to read as Income Tax Act, since the case (Commissioner of Income Tax V/s Express Newspaper Limited) was with regard to the provisions of the Income Tax Act. Mr.Harishankar pointed out that the learned Single Judge of the Madras High Court has failed to notice that in both the cases the Supreme Court was dealing with the cases prior to 1991, and as such the same ought not to be applied. Prior to 1991, the veto power was conferred on the Commissioner of Income Tax in cases of fraud, and this power no longer existed after 1991. The Commissioner had power to grant veto in the sense that he could prevent the Settlement Commission from proceeding with the application being heard, which provision existed only upto 1991 and was deleted in the year 1991. The Supreme Court, in the above mentioned two cases was dealing with the cases pertaining to the situation prior to 1991. Mr.Harishankar also pointed out that the observations of the Madras High Court - that in case of bonafide cases only the Settlement Commission will have jurisdiction, would not be proper since if one were to look into the provisions of Section 127-H it would be clear that the Settlement Commission can grant immunity from the prosecution, fine and penalty under the Customs Act or any other law including the Indian Penal Code, which means, obviously, the parties who have committed a fraud, smuggling or gross misdeclaration, etc. Mr.Harishankar contends that the observations of the

Madras High Court that the Settlement Commission would have jurisdiction only in bonafide cases, cannot be sustained. He pointed out that the Madras High Court seems to have proceeded on an erroneous assumption that the party cannot come to the Settlement Commission after being caught, in the sense, the party ought to come to the Settlement Commission before being caught. This is the anomoly from the provisions of the Income Tax Act whereas in the Customs Act there is no provision of coming with clean hands. On the contrary, the show cause notice has to be issued and then only the party can approach. Mr.Harishankar submitted that the judgment of the Madras High Court cannot be sustained and the same ought not to be acted upon as the same does not lay down the correct law. With regard to the main contention of Mr.Rana that in case of fraud the Settlement Commission ought not to have jurisdiction, in that context, Mr.Harishankar contended that the expression "fraud" is wider expression in the sense it can be evasion or it can be much more than that. In that context he brought to our notice the judgment of the Supreme Court in the case of **Commissioner of Customs V/s Essar Oil Ltd. - 2004 (172) ELT 433 (SC),** wherein the Supreme Court has construed that even the misrepresentation amounts to fraud. Mr.Harishankar contended that there is no question of going into the question of greater fraud or lesser fraud. In case of any fraud, the Settlement Commission has jurisdiction and in a given case if the Commission finds the case was not fit to be entertained it can reject the same at the preliminary stage also. He contended that merely on the

ground that the fraud is involved should not preclude a party from approaching the Settlement Commission as sought to be contended by Mr.Rana. The Commission always has jurisdiction to reject the application on the threshhold stage depending upon the nature and complexity of the case. The said power can be exercised at any stage. Over and above, Mr.Harishankar also submitted that even assuming for a moment if the Settlement Commission were to abuse its power under Chapter XIV-A, this Court can always interfere under Article 226 of the Constitution of India exercising the extraordinary jurisdiction.

36. Mr.Shreedharan, the learned Counsel appearing for some of the private parties adopted the arguments of Mr.Harishankar and Mr.Shroff and contended that the Settlement Commission has wider jurisdiction and not the restricted jurisdiction as sought to be contended by Mr.Rana. Mr.Shreedharan, on the issue of "or otherwise" referred to the judgment of the Supreme Court in the case of **Rajasthan State Electricity Board, Jaipur V/s.Mohan Lal & Ors. - AIR 1967 Supreme Court 1857,** wherein in paragraph No.4, the Supreme Court has observed as under:-

"To invoke the application of the ejusdem genesis rule there must be a distinct genus or category. The specific word must apply not to different objects of a widely differing character but to something which can be called a class of kind of objects. Where this is lacking, the rule cannot apply, but the mention of a single species does not constitute a genus."

To put in other words, it is submitted by Mr.Shreedharan

that mere mention of a single species will not constitute genus, so that the principle of ejusdem generis will not apply. In support of his submissions, Mr.Shreedharan also referred to and relied upon the Division Bench Judgment of our High Court in the case of **Pratibha Syntex Ltd. V/s Union of India - 2003 (157) ELT 141 (Bom.)** wherein the High Court has held as under:-

"Once the petitioners have voluntarily chosen the jurisdiction of the entire issue by the Settlement Commission afresh, in the light of the disclosure made by them it was open to the Settlement Commission to direct the petitioners to pay the customs duty with interest. Although the Settlement Commission has levied interest at a percentage, much less than what was agreed to pay by the petitioners in their bond and legal undertaking, the same being not an issue in this petition, we are not expressing any opinion in that behalf. Therefore, we have no hesitation in holding that once the petitioners committed breach of the terms of the exemption Notification No.204/92, the Customs authorities were entitled to enforce the declaration with bond and legal undertaking given by the petitioners and recover customs duty with interest. If the customs authorities were entitled to recover duty with interest, then no fault could be found with the Settlement Commission in directing the petitioners to pay customs duty with interest."

37. The learned Counsel Mr.Shreedharan has further contended that the Settlement Commission's jurisdiction is wide enough to entertain any application subject to fulfilment of conditions of filing the Bill of Entry, issuance of show cause notice, and furnishing of all the details as per the prescribed form. According to him the jurisdiction of the Settlement Comission, cannot be restricted only in case of misclassification, as sought to be contended by Mr.Rana.

38. After having heard all the learned Counsel for the Petitioners and the Respondents i.e. for the Customs Department as well as the private parties, we make it explicitly clear that all the learned Counsel appearing for the Customs Department as well all as the learned Counsel appearing for the private parties in all the aforesaid petitions, have argued in all the above matters only on the issue of jurisdiction of the Settlement Commission and nothing else.

39. It is the main contention of the learned Counsel Mr.Rana that the Settlement Commission has a limited jurisdiction as per Section 127-B of the Customs Act, in the sense that only the cases of misclassification or such similar cases including the wilful misclassification wherein the notice under Section 28 of the Customs Act has been issued can be entertained by the Settlement Commission, and that the Settlement Commission has no jurisdiction in the other cases and it cannot even entertain the application for settlement. With regard to the above contention a perusal of Section 127-B makes it abundantly clear that the Applicant must be an importer or exporter or any other person who can file an application at any stage of a case relating to him. The above wording make it clear that either the importer or the exporter or any person can approach the Settlement Commission at any stage. Emphasis is that the person need not come right at the beginning, he can come even at the later stage or at the appellate stage or at revisional stage. Section 127-B makes it clear

that such an application should be as per the form prescribed by the rules. As we have pointed out earlier the form prescribed by the rules very clearly indicates that the applicant should furnish the details regarding the Bill of Entry/ shipping Bill in relation to the case of settlement. The Applicant should indicate the additional amount of duty payable on the goods covered in the Bill of Entry/Shipping Bill, duty liability accepted out of the total duty demanded in the show cause notice, if any, issued and the manner in which such a duty liability has been derived. Further he must indicate full and true disclosure of the facts regarding the issues sought to be settled. These are the particulars which are sought as per the form prescribed by the Customs Department. In the said form another vital fact to be noted is that under clause (9) of the said form the details of date of seizure, if any, is required to be given. The seizure can only arise if goods are liable for confiscation. Therefore, the notice for confiscation under Section 124 or under Section 111 would automatically get covered under Section 127-B.

40. Over and above, again going back to the main section, it is very clear as indicated therein, that the application should contain full and true disclosure of the duty liability which has not been disclosed before the proper officer, the manner in which such a liability has been incurred, the additional amount of customs duty accepted to be payable by him. The above section lays down that all the above details have to be furnished in

such an application. Over and above, as referred to hereinabove, as per the provisions of above section, "such other particulars as may be specified by the rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification or otherwise of the goods", should also be mentioned by the Applicant in his application. As we have mentioned earlier, the learned Counsel for both sides, viz. for the Customs Department and for the private parties have clearly stated that till date there are no specified rules with regard to such particulars regarding the dutiable goods in respect of which the Applicant admits short levy or misclassification or otherwise. A bare reading of the above section does not in any manner indicate that the jurisdiction is restricted only to cases of a short levy of misclassification or otherwise.

41. One cannot forget that since the disputes take longer time to get it resolved, the revenue of the Government suffers. The very object of introducing Chapter XIV-A regarding "Settlement of Cases" in the Act was to enable the Custom Authorities to recover dues in all the cases as clearly indicated in the object when the amendment was introduced, and to resolve all the disputes. Relying on the similar provisions provided under the Income Tax Act, the Parliament felt it necessary to introduce such a remedial measure by way of a Settlement Commission and accordingly Chapter XIV-A was provided. Another aspect to be noted is that the entire scheme under Chapter XIV-A as enumerated

hereinabove clearly indicate that the Settlement Commission has been given very wide powers to settle the matter. It has also been given the widest discretion including the power to declare the settlement to be void with a power to direct denovo adjudication. Ample power is given to the Settlement Commission to protect the interests of the revenue and even with regard to the grant of immunity from prosecution and penalty. However, as indicated hereinabove, the Settlement commission does not grant immunity as a matter of course. It has discretion to grant immunity in a given case. Even if it were to grant immunity, the Settlement Commission can always impose conditions while doing so. The Settlement Commission has power even to attach the properties of the Applicant to secure the interest of the Revenue during the pendency of the proceedings before him, which power even the adjudicating authority does not have. As rightly pointed out by the learned Counsel appearing for the private parties, the Settlement Commission has power to grant immunity with regard to all kinds of prosecution under the Customs Act and any other law including the Indian Penal Code, which obviously would necessitate the Applicant being involved in a serious fraud wherein he is likely to be prosecuted under the Indian Penal Code or any other penal law. If that be so, one cannot say that the Settlement Commission has jurisdiction only to deal with the bonafide case of misclassification or at the most wilful case of misclassification.

42. One cannot minimise the scope of jurisdiction of

the Settlement Commission without any express provisions found in the said Chapter, whereas on the contrary, the provisions as indicated hereinabove clearly show that the Settlement Commission has a very wide jurisdiction to entertain all kinds of settlement claim applications with the liberty to reject the same even at the preliminary stage, depending upon the nature and circumstances of the case and the complexity of the case. Therefore, it is not the case that the Settlement Commission is forced to entertain and accept all settlement applications. After the scrutiny, it may or may not entertain the same. It is one thing to say that the Settlement Commission does not have the jurisdiction at all to look at the claim which is not pertaining to the short levy due to misclassification or otherwise, whereas it is another thing to say that the Settlement Commission has jurisdiction to entertain all kinds of applications and it has jurisdiction to reject the same even at the preliminary stage.

43. The following observations of the the Hon'ble Supreme Court in Paragraph No.8 of its judgment in the case of **R.K.Garg V/s.Union of India - (1981) 4 Supreme Court Cases 675** - are very apt in the above context, which read as under:-

"The Court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry".

"Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and

therefore it cannot provide for all possible situations or anticipate all possible abuses."

"There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid."

"There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distrortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses."

44. The entire approach with regard to such legislation is to unearth frauds and dishonesty so as to collect the revenue for the Government. By this process in fact the duty which was illegally not paid by various parties would ultimately come to the Revenue and if one were to restrict the interpretation to mean only the bonafide cases, then there would be no scope of unearthing the revenue for the Government. As we are very clear in our mind that the earlier part of Section 127-B lays down the jurisdiction and the later part only deals with the rules whereby certain details are to be provided. Hence, the entire argument with regard to the short levy due to misclassification or otherwise is purely a procedural one, in the sense, as long as rules are not even provided, there is no need to decide the same.

45. In any event, having regard to the entire structure of Chapter XIV-A we are very clear in our mind that the Settlement Commission has jurisdiction to entertain all kinds of applications for settlement, provided they satisfy the mandatory requirements of filing the Bill of Entry/Shipping Bill, and issuance of a show cause notice in relation to such a Bill of Entry/Shipping Bill and by

making a full and true disclosure of a duty liability which was not disclosed earlier before the proper officer and the manner in which such liability has been incurred and the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification or otherwise of goods. These are the essential requirements for making an application under Section 127-B of the Customs Act, which are also clear from the wording of the very section as well as from the particulars to be given in the Form prescribed by the Department, as we have indicated herein above.

46. So far as the judgment of the learned Single Judge of the Madras High Court in the case of **Commissioner of Customs V/s Customs and Central Excise Settlement Commission - 2002 (139) ELT 512 (Madras),** which has been referred to and relied upon by by the learned Counsel Mr.Rana appearing for the Department, is concerned, the learned Single Judge of the Madras High Court has relied upon two decisions of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax, Madras V/s Express Newspapers Limited - 1994 (2) SCC 374 and in the case of Kuldeep Industrial Corporation V/s. Income Tax Officer - AIR 1991 SC 3631**. However, it may be noted here, (as has been rightly pointed out by the learned Counsel Mr.Harishankar and Mr.Shroff appearing for the private parties) that in both the cases before the Supreme Court, the situation was totally different, in the sense

the Supreme Court considered the provisions of the Income Tax Act as they existed in 1978 and 1979 i.e.prior to their amendment in 1991, which fact has not been considered by the learned Single Judge of the Madras High Court. In the year 1991 the amendment had taken place and the law had completely changed, which apparently has not been noted by the learne Single Judge of the Madras High Court. Over and above, there is a clear distinction in the Income Tax Law and the Customs Act. In the sense, in the Income Tax Law any application must be made before the investigation has started or before the authority has collected any material or any notice is issued to the applicant. In the Income Tax Law there is a voluntary aspect in the discolsure. On the contrary, in the Customs Act, the provision makes it mandatory that the Applicant can file an application only after show cause notice is issued, which show cause notice as we have pointed out hereinabove, would pertain even to confiscation. i.e.to say the person who has committed fraud or smuggling or deliberate misdeclaration would only receive such show cause notice and such a show cause notice is essential ingredient before making an application. If that be so, there can never be any case of voluntary aspect in the case of application for settlement before the Settlement Commission under the Customs Act. The learned Single Judge of the Madras High Court did not examine or consider the above aspects. In view of the same, we respectfully do not agree with the judgment of the learned Single Judge of the Madras High Court.

47. Under these circumstances, in all the petitions filed by the Government viz. Writ Petitions 115/2004, 1636/2004, 9995/2004, 507/2004 & 2379/2004 the Rule stand discharged. As far as petitions filed by the private parties are concerned, viz.Writ Petition Nos.4381/2005, 671/2005, 2430/2004, 1051/2005 & 2/2004 the Rule is accordingly made absolute in terms of the above.

**(DR.S.RADHAKRISHNAN J.)**

**(J.H.BHATIA J.)**